IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1572

REVERE COPPER AND BRASS INCORPORATED,

*Petitioner,*

v.

OVERSEAS PRIVATE INVESTMENT CORPORATION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## REPLY BRIEF FOR THE PETITIONER


WILLIAM E. HEGARTY
80 Pine Street
New York, New York 10005
(212) 825-0100

*Counsel for Petitioner*

*Of Counsel:*

CAHILL GORDON & REINDEL
MICHAEL P. TIERNEY
GEORGE WAILAND
CHARLES A. GILMAN
and
RICHARD A. MAHFOOD, Q.C.


May 9, 1980

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1. OPIC asserts that the arbitral majority "did not find that the contract was ambiguous." (OPIC 1, 11-12).

The arbitral majority recognized the "force" of Revere's contention that the contractual provision relied upon by OPIC was "essentially meaningless" (86a, 85a)—certainly a high order of ambiguity. The pertinent provisions of OPIC's policy are part of the award (83a, 132a-134a), and the ambiguity which is created by the reference (133a) to Section 482 of the Code (134a) is manifest on the face of the award. There would be no occasion for the Court, OPIC to the contrary notwithstanding (OPIC 12), to go beyond the award itself in answering the questions presented.

2. In its restatement of the questions presented and on every page but one of its brief (OPIC 1, 2, 4, 5, 6, 7, 8, 9,

10, 11, 12, 13), OPIC characterizes the award as simply involving the construction of a contract.

Such repetition does not change the fact that an ambiguous insurance policy was construed in favor of the insurer and thus a rule of public policy was violated. OPIC, the insurer, has been permitted to sell an ambiguous insurance policy and then use the ambiguity as a defense against Revere, the insured. None of the cases cited by OPIC involve an insurance relationship. *Contra proferentem* is, in the context of insurance, not simply a rule of construction. It is the expression of a fundamental public policy. OPIC elides from its quotation (OPIC 6) from *Enterprise Wheel* this Court's statement that the question of interpretation of "the collective bargaining agreement" is a question for the arbitrator (363 U.S. at 599) and ignores the fact that the labor-management relationship is a "formal government of its own" (*id.* at 596-97 n.2).

3. OPIC says (OPIC 9) that Revere "attempts to confuse the question of the enforceability of an agreement to arbitrate with the different question of the scope of review of an arbitration award."

OPIC concedes, tacitly, that under § 2 of the Arbitration Act public policy is a ground for the revocation of an arbitration clause (*ibid.*). OPIC then asserts (OPIC 9-10) that an award may be vacated or modified only on the grounds listed in §§ 10 and 11. OPIC, again tacitly, is arguing that despite the teaching of *Hurd* v. *Hodge*, 334 U.S. 24, 34-35 (1948), an award which violates public policy may nevertheless be made a judgment of the district court under § 13. Yet, even the court of appeals recognized (4a) that there is a "public policy exception to the enforcement of arbitration awards" although it erroneously confined the exception to a formulation developed in the review of labor awards.* The confusion is in OPIC's response, not in Revere's argument.



4. OPIC says (OPIC 11) that the Court of Appeals "did not confuse the Labor Act and the Federal Arbitration Act".

OPIC's justification (*ibid.*) for the assertion is that the court of appeals "merely" stated that there was no difference between the policies expressed in and the situations governed by the two acts. OPIC in terms thus concedes the application by the court of appeals of the policy of the Labor Act to an arbitration governed by the Arbitration Act. That the court did so is the subject of the second question presented.

5. OPIC says (OPIC 12) that the result here "affects only Revere and OPIC." **

OPIC's statement is sophomoric. In the strict sense, of course, the results in all litigations affect only the litigants. It is the questions presented, however, which, matter. They are important, unresolved questions of federal law. The erroneous answers of the court of appeals confirm informed distrust of the arbitration process where the courts, succumbing to easy generalizations, have mistakenly given arbitrators entire freedom to make arbitrary decisions from which no relief may be had. OPIC

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* OPIC does not respond to the fact that the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* explicitly authorizes the courts to deny enforcement to awards which are contrary to domestic public policy—an authority and mandate so plain in domestic law and as applied to domestic awards that it needed no statement in the Arbitration Act.

** OPIC says (*ibid.*) that arbitration awards do not have precedential effect. However, the arbitrators here cited (46a, 48a, 49a, 61a, 62a) a number of awards, and OPIC argued to the arbitrators earlier awards to which it had been party.

would prefer to ignore the matter, but the questions here presented bear upon the some $9,000,000,000 of OPIC insurance in force.

6. OPIC asserts that Revere seeks "an anomalous and unjust result" (OPIC 4) that Revere's claim violates the "'principle of indemnity'" (OPIC 12) and that Revere would have received a "windfall" (OPIC 13) if it had received the $62,999,856 by which the arbitral majority reduced Revere's Net Investment.

Yet, OPIC concedes (OPIC 3 n.4) that

> "The contract provided that compensation was to be Revere's 'Net Investment' in RJA as of the date of expropriation, and that 'Net Investment' was *to be determined by a contractual formula,* which required that the original amount of the insured investment be reduced to reflect subsequent losses of RJA (132a-133a)." (Emphasis added.)

OPIC also acknowledges that Revere's insured equity investment had a "book value" of $64,131,000 (OPIC Br. 3).* This book value reflected RJA's losses up to the time of its expropriation by the Government of Jamaica. It did not reflect unrealized losses; any reduction in Net Investment by reason of unrealized losses was expressly prohibited by OPIC's insurance policy (132a). OPIC chose the measure of Revere's loss under the policy for which Revere paid some $600,000 each year in premiums. Revere did not purchase insurance in an indeterminate amount to be computed after occurrence of the insured event any more than one who purchases a life insurance policy expects its "value"

* OPIC states that RJA's books were prepared on a "consolidated" basis. This statement is not true. The financial statements showing Net Investment were certified by Coopers & Lybrand and were those of RJA alone.



to be the object of a subjective determination after death. Revere contracted, in a relationship of *uberrima fides,* for compensation in accordance with a pre-agreed formula. Revere's investment was expropriated, and OPIC did not contest this finding in the courts below. The "anomaly" is that Revere has not received the compensation promised by OPIC's insurance policy.

## CONCLUSION

The writ of certiorari should issue.

Respectfully submitted,

William E. Hegarty
80 Pine Street
New York, New York 10005
(212) 825-0100

*Counsel for Petitioner*

*Of Counsel:*

Cahill Gordon & Reindel
Michael P. Tierney
George Wailand
Charles A. Gilman
and
Richard A. Mahfood, Q.C.

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